No. 95-1100

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

THE BOARD OF THE COUNTY COMMISSIONERS
OF BRYAN COUNTY, OKLAHOMA,
Petitioner,

v.

JILL BROWN, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

DANIEL J. POPEO
RICHARD A. SAMP
(Counsel of Record)
WASHINGTON LEGAL
FOUNDATION
2009 Massachusetts Ave, NW
Washington, DC 20036
(202) 588-0302

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QUESTIONS PRESENTED

1. Does 42 U.S.C. § 1983 create a cause of action against a municipality based on a single hiring decision, where the hiring decision is not part of a consistently-applied hiring policy?

2. Does 42 U.S.C. § 1983 create a cause of action against a municipality based on a demonstrated willingness to hire those with misdemeanor conviction records, in the absence of evidence that such willingness is affirmatively linked to a deprivation of constitutional rights?

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INTERESTS OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial portion of its resources to promoting civil justice reform, including tort reform. To that end, WLF has appeared before this Court as well as other federal and state courts to argue against overly expansive theories of

tort liability, excessive punitive damages, and imposition of unwarranted attorney fee awards against municipalities and other defendants. *See, e.g., BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996); *City of Burlington v. Dague*, 505 U.S. 557 (1992).

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

WLF and AEF believe that despite this Court's admonition in *Monell v Dept. of Social Services*, 436 U.S. 658 (1978), that 42 U.S.C. § 1983 does *not* impose strict liability on municipalities for the wrongful acts of their employees, the lower courts increasingly are enforcing that statute as though it does. The result is that in virtually *every* § 1983 suit involving an individual injured by a municipal employee, the municipality is named as a defendant, and taxpayers across the nation are being forced to fund the often exorbitant awards being given to plaintiffs and their contingent-fee attorneys. WLF and AEF believe that it is important for the Court to establish bright-line tests that will make municipal liability the exception rather than the rule in cases involving alleged misconduct by municipal employees.

Amici submit this brief in support of Petitioner with the written consent of both parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* hereby adopt by reference the Statement of the Case set forth in Petitioner's brief.

This case involves an attempt to impose liability on a municipality based on the conduct of one of its employees, a Reserve Deputy Sheriff found by a jury to have used excessive force in removing a passenger (Respondent Jill Brown) from a motor vehicle. At issue is whether Congress -- in adopting § 1 of the Ku Klux Klan Act of 1871, 42 U.S.C. § 1983 -- intended to create a cause of action against a municipality under the facts of this case.

Mrs. Brown was a passenger in a truck being driven by her husband in the early hours of May 12, 1991 when the truck approached a police checkpoint in Bryan County, Oklahoma. Not wishing to pass through the checkpoint, Mr. Brown turned the truck around and drove off in the opposite direction. Two Bryan County law enforcement officers, Deputy Sheriff Robert Morrison and Reserve Deputy Stacy Burns, pursued the truck for several miles before successfully pulling it over. By that time, the truck had crossed the border from Oklahoma into Grayson County, Texas.

Burns and Morrison then exited their squad car and approached the Browns' vehicle, with Burns coming to the passenger side. After twice ordering Mrs. Brown from the vehicle, Burns pulled her from her seat and dropped her to the ground. Petition Appendix ("Pet. App.") 5a. Mrs. Brown's impact with the ground caused severe injury to her knees. *Id.* Burns thereafter handcuffed Mrs. Brown for at

least 30 minutes, although she was never charged with any crime.

Mrs. Brown filed suit under 42 U.S.C. § 1983 in U.S. District Court for the Eastern District of Texas against Burns, Morrison, Bryan County Sheriff B.J. Moore, and the Board of the County Commissioners of Bryan County, Oklahoma ("Bryan County"). She alleged that Burns's actions in forcibly removing her from a vehicle and handcuffing her for an extended period of time violated her rights under the Fourth, Fifth, Eighth, and Fourteenth Amendments to the Constitution. She alleged that Bryan County violated her constitutional rights by hiring Burns and failing to train him adequately.

Following a trial, the jury found against Burns and Bryan County but in favor of Defendants Morrison and Moore. It found that Burns had used excessive force in pulling Mrs. Brown from her vehicle, had falsely imprisoned Mrs. Brown, and was not entitled to a good-faith immunity defense. The jury also found that "the hiring policy of Bryan County in the case of Stacy Burns" and "the training policy of Bryan County in the case of Stacy Burns" were "so inadequate as to amount to deliberate indifference to the constitutional needs" of Mrs. Brown. Based on that verdict, the district judge entered judgment against Burns and Bryan County for $711,302, plus punitive damages and attorney fees.

The U.S. Court of Appeals for the Fifth Circuit affirmed the district court judgment by a 2-1 vote. The appeals court recognized that § 1983 permits imposition of a damage award against a municipality only where the plaintiff's constitutional rights have been violated pursuant to some municipal policy. However, the court said, "it is

clear that a single decision" may constitute the requisite municipal policy and thus "may create municipal liability *if* that decision were made by a final policymaker responsible for that activity." Pet. App. 18a. The Court concluded that since Bryan County had given Sheriff Moore policymaking authority to hire Burns, Moore's decision to hire Burns constituted county "policy" for purposes of § 1983 liability. *Id.*

The appeals court also upheld, without extensive discussion, the jury's determination that Mrs. Brown's injuries were *caused* by Bryan County's allegedly inadequate hiring policy. Pet. App. 24a ("the jury could find that hiring an unqualified applicant and authorizing him to make forcible arrests actually caused the injuries suffered by Mrs. Brown.").

The Fifth Circuit did not consider Mrs. Brown's alternative cause of action -- that her injuries were caused by Bryan County's constitutionally deficient *training* policy for its deputy sheriffs.

Judge Emilio M. Garza dissented from that portion of the panel's decision imposing liability on Bryan County. Pet. App. 26a-29a. He argued that a single negligent hiring decision, such as the decision to hire Burns, cannot constitute an "unconstitutional municipal policy" for purposes of imposing liability under § 1983. *Id.* at 26a. He wrote, "Where the policymaker's decision does not *directly* 'order' or 'authorize' the constitutional violation, something more than a single decision is required in order to find that this decision in fact constitutes 'municipal policy,' such that we can hold the county liable." *Id.* at 28a-29a.

The Court granted Bryan County's certiorari petition on April 22, 1996, to review the Fifth Circuit's decision that § 1983 liability could be imposed on Bryan County based on its decision to hire Burns and authorize him to make forcible arrests.

SUMMARY OF ARGUMENT

In seeking to impose liability on Bryan County based on its decision to hire Reserve Deputy Burns, Mrs. Brown is attempting to expand the definition on municipal "policy" beyond all reasonable bounds. Such an expansion would effectively constitute adoption of a *respondeat superior* theory of liability, a theory of liability expressly rejected by Congress when it adopted 42 U.S.C. § 1983.

Amici propose the following alternative rule. A single decision by a municipal policymaker does not constitute municipal "policy" actionable under § 1983 unless: (1) the decision carries out what has been understood to be an existing, albeit unofficial, standard operating procedure; or (2) there is some contemplation that the decision has established a precedent that the municipality will follow if and when it again faces the same set of circumstances. When the decision being challenged is not itself unconstitutional, the Court should be particularly reluctant to adopt any rule of liability broader than that outlined above.

Mrs. Brown's cause of action should fail for the additional reason that she has failed to establish an "affirmative link" between Petitioner's decision to hire Burns and her subsequent injury. Indeed, *amici* doubt that a § 1983 plaintiff could ever establish that a deficient hiring policy was the "moving force" behind subsequent police misconduct. For that reason, *amici* urge the Court to

declare that allegedly deficient hiring policies cannot serve as a predicate for municipal liability under § 1983. Moreover, principles of federalism dictate that the federal courts refrain from becoming too deeply involved in municipal hiring policies.

ARGUMENT

I. A SINGLE HIRING DECISION CANNOT CONSTITUTE MUNICIPAL "POLICY" FOR PURPOSES OF IMPOSING § 1983 LIABILITY

A. A Single Decision by Municipal Officials Does Not Constitute "Policy" Unless There Is Some Contemplation that the Same Decision Will Be Repeated Should the Municipality Be Faced with a Similar Situation.

When the Court in *Monell* overruled prior precedent and held for the first time that municipalities are "persons" subject to damages liability under 42 U.S.C. § 1983,[1] it made clear that it was not opening the floodgates to actions premised on the mere fact that the municipality employed an alleged wrongdoer. Rather, municipal liability could

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[1] 42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . ., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

only be imposed for injuries inflicted pursuant to government "policy or custom." *Monell*, 436 U.S. at 694.

In seeking to impose liability on Bryan County based on its decision to hire Reserve Deputy Burns, Mrs. Brown is attempting to expand the definition of a municipal "policy" beyond all reasonable bounds. If a single hiring decision could constitute actionable municipal "policy," then virtually any government action would so qualify, and the *respondeat superior* theory of liability warned against by *Monell* for § 1983 cases would become a reality.

Mrs. Brown's argument that a single hiring decision can constitute municipal policy actionable under § 1983 is based on a misreading of the Court's decision in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). *Pembaur* involved a § 1983 action brought by a doctor against several municipalities after law enforcement officers (in violation of his Fourth and Fourteenth Amendment rights) broke open his office door in order to serve capiases on two employees of the doctor who had failed to respond to grand jury subpoenas. The officers acted after: (1) being refused entrance by the doctor; (2) calling the prosecutor's office for advice; and (3) being instructed by the County Prosecutor to break open the door. *Pembaur*, 475 U.S. at 472-73.

The Court held that the decision to break open the office door constituted actionable municipal "policy" within the meaning of § 1983. The Court said:

> [I]t is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances. . . . [W]here action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly. . . . We hold that municipal liability under § 1983 attaches where -- and only where -- a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.

Id. at 480, 481, 483-84.

Since the decision to break down the doctor's door was made at the highest level of municipal decisionmaking, and since that decision appeared to be consistent with municipal actions in similar situations (the Prosecutor's office appeared to consider it standard procedure to use forcible entries, if necessary, to serve capiases), the Court had no occasion in *Pembaur* to consider at length the types of municipal actions that could qualify as § 1983 "policies." However, two of the concurring opinions (those of Justices White and O'Connor) included language that significantly limited the definition of "policy."[2] Justice White premised his concurrence on Cincinnati's concession that "forcible entry of third-party property to effect otherwise valid arrests was standard operating procedure." *Id.* at 485

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[2] Those two concurring opinions must be taken into account in determining *Pembaur*'s scope, because Justices White and O'Connor provided the majority with the necessary fifth and sixth votes. Justice O'Connor concurred in the judgment but did not join those portions of the Court's opinion that discussed when actions by municipal officials could constitute a municipal "policy" for § 1983 purposes. *Pembaur*, 475 U.S. at 491 (O'Connor, J., concurring in part and concurring in the judgment). Justice White, while concurring in the Court's opinion, made clear that he did so with the understanding that the opinion did not encompass a broader definition of § 1983 "policy" than is outlined in his concurring opinion. *Id.* at 485-87 (White, J., concurring).

(White, J., concurring). He pointedly stated, moreover, that the fact that Cincinnati's standard operating procedure constituted a § 1983 "policy" "does not mean that every act of municipal officers with final authority to effect or authorize arrests and searches represents the policy of the municipality." *Id.* at 486. While concurring in the judgment, Justice O'Connor explicitly concurred in Justice White's rationale and added, "I fear that the standard the majority articulates may be misread to expose municipalities to liability beyond that envisioned by the Court in *Monell*." *Id.* at 491 (O'Connor, J., concurring in part and concurring in the judgment).

Pembaur, then, can be understood as endorsing the proposition that *only sometimes* does a single decision by municipal policymakers constitute a municipal "policy" actionable under § 1983. While a single decision made by policymakers pursuant to an unofficial "standard operating procedure" was found sufficient to create an actionable municipal "policy" in *Pembaur*, it does not follow (as argued by Mrs. Brown) that a § 1983 "policy" is created by *every* decision made by a municipal official authorized to make such decisions.

Indeed, such a rule would lead to absurd results. For example, police officers are routinely authorized by their employers to conduct searches of private property. While they generally are warned not to engage in searches prohibited by the Fourth Amendment, the infinite variety of fact patterns that police officers routinely confront when attempting to determine whether searches are appropriate, as well as the complexity of Fourth Amendment case law, means that officers cannot reasonably be expected to know in advance whether their actions will later be found to violate Fourth Amendment rights. Thus, to hold that a

police officer creates municipal "policy" every time (s)he conducts a search not absolutely forbidden by existing case law would be, in effect, to impose *respondeat superior* liability on a municipality for virtually all actions of its police officers. *See* K. Lewis, *Section 1983: A Matter of Policy*, 70 MICH. BAR J. 556, 558 (1991)("If the mere exercise of discretion by an employee could give rise to a constitutional violation, the result would be indistinguishable from *respondeat superior* liability.").

A far more reasonable rule -- and one more in line with the understanding of § 1983 expressed in *Monell* -- would hold that a single decision by a municipal policymaker does not constitute a municipal "policy" actionable under § 1983 unless: (1) the decision carries out what has been understood to be an existing, albeit unofficial, standard operating procedure; or (2) there is some contemplation that the decision has established a precedent that the municipality will follow if and when it again faces the same set of circumstances.

Under the rule proposed here, Bryan County's decision to hire Reserve Deputy Sheriff Burns cannot constitute a municipal "policy" actionable under § 1983. Mrs. Brown alleges that her injuries were caused by Bryan County's decision to hire Burns, a hiring decision she describes as "so inadequate as to amount to deliberate indifference to the constitutional rights of citizens." Respondent's Opposition Brief at 6. Yet, nowhere does Mrs. Brown allege that such deliberate indifference was standard operating procedure in Bryan County or that Bryan County contemplated employing similar indifference in future hiring

decisions.[3] In the absence of such allegations, Mrs. Brown cannot establish that Bryan County had adopted a "policy" of "deliberate indifference to the constitutional rights of citizens," actionable under § 1983. *See* P. Kelly, *Deliberate Indifference: A Heightened Standard for Municipal Liability*, 19 COLO. LAW. 861, 862 (1990)("[D]eliberate indifference claims that are supported by conclusory or single incident allegations are subject to a motion to dismiss for failure to state a claim.").

In upholding imposition of § 1983 liability on Bryan County based on a single hiring decision, the Fifth Circuit relied on Bryan County's stipulation that Sheriff Moore had been granted final policymaking authority regarding all hiring and firing decisions within the Sheriff's Department. Pet. App. 16a. But simply because he acted within his delegated authority in hiring Burns does not mean that Sheriff Moore had authority to establish all county *policy* with respect to employment practices within his department. Indeed, the record clearly shows that he did *not* have such broad authority; for example, he was prohibited under Oklahoma law from hiring a deputy without first establishing that: (1) the Oklahoma State Bureau of Investigation and the FBI have reported that the applicant "has no record of a conviction of a felony or a crime involving moral turpitude"; (2) the applicant has undergone a psychological evaluation and has been found "suitable to serve as a peace officer"; and (3) the applicant is a high

[3] Indeed, the "deliberate indifference" issue was presented to the jury with a sole focus on the decision to hire Burns. The jury was asked to determine whether "the hiring policy of Bryan County *in the case of Stacy Burns* was so inadequate as to amount to deliberate indifference to the constitutional needs of the plaintiff." Pet. at 5 (emphasis added).

school graduate. Okla. Stat. Ann., tit. 70, § 3311 (West 1994). Nor did the appeals court suggest that Sheriff Moore had been delegated authority to establish a hiring policy in conflict with the numerous personnel policies established by the Oklahoma legislature and/or the Board of the County Commissioners -- such as the prohibition against hiring on the basis of race. Accordingly, the Court should be particularly reluctant to approve imposition of § 1983 liability on the basis of a "policy" applicable only to a single hiring decision made by a municipal employee whose "policymaking" authority consisted of little more than the authority to make hiring decisions in accordance with state and local law.

Indeed, the Court strongly suggested in *Pembaur* that a municipal employee does *not* make "policy" for purposes of § 1983 merely by virtue of exercising final authority over individual hiring and firing decisions. Rather, the Court indicated, the § 1983 "policy" consists in that instance of establishing an overall employment policy applicable to *all* hiring and firing decisions:

> The fact that a particular official -- even a policymaking official -- has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion. See, *e.g.*, *Oklahoma City v. Tuttle*, 471 U.S. [808], 822-824 [(1985)]. The official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable. . . .
>
> **12.** Thus, for example, the County Sheriff may have discretion to hire and fire employees without also being the county official responsible for establishing

> county employment policy. If this were the case, the Sheriff's decisions respecting employment would not give rise to municipal liability, although similar decisions with respect to law enforcement practices, over which the Sheriff *is* the official policymaker, *would* give rise to municipal liability. Instead, if county employment policy was set by the Board of County Commissioners, only that body's decisions would provide a basis for county liability. *This would be true even if the Board left the Sheriff discretion to hire and fire employees and the Sheriff exercised discretion in an unconstitutional manner; the decision to act unlawfully would not be a decision of the Board.*

Pembaur, 475 U.S. at 482-83 & n.12 (final emphasis added). In other words, the Court indicated that hiring "policy" for purposes of § 1983 consists of rules generally applicable to all new hires, not to decisions to hire particular individuals.

Despite ruling against Bryan County, the district judge appeared to agree that Sheriff Moore should not be viewed as a policymaker merely by virtue of his hiring/firing authority. In rejecting Bryan County's argument that it should be shielded from liability under the Oklahoma Tort Claims Act (which exempts Oklahoma municipalities from state-law claims resulting from "performance of or the failure to exercise or perform any act or service which is in the discretion of the state or political subdivision or its employees"), the district court stated that the county was ineligible for that defense because Sheriff Moore's decision to hire Burns was a "ministerial" act, not a "policy or planning decision." Pet. App. 33a-34a.[4] The same rationale that dictated rejection of Bryan County's Oklahoma Tort Claims Act defense counsels against a finding that Sheriff Moore's decision to hire Burns should be deemed a "policy" for purposes of imposing § 1983 liability.

It bears repeating that Mrs. Brown is challenging Bryan County's "policy" in hiring Burns, not the Sheriff Department's overall hiring record. Even the Fifth Circuit conceded that any inadequacy in Sheriff Moore's background check of Burns before hiring him was atypical of Moore's normal practice. The appeals court said: "It is certainly true that the Sheriff had conducted adequate background checks on other deputies and assured himself that they were certified before putting them on the street." Pet. App. 24a n.22. *Pembaur* makes clear that such a challenge to a single hiring decision does not rise to the level of a challenge to a § 1983 "policy."

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[4] The district court's comments came in connection with its September 1993 denial of Petitioner's motion for judgment notwithstanding the verdict. The district judge explained his rationale as follows:

> Oklahoma has adopted the planning operational approach [to discretionary functions exception claims], whereby initial policy or planning decisions are discretionary, and thus exempt, while operational decisions made in the implementation and performance of the policy in specific instances are ministerial. The evidence in this case shows that the initial formulation of the policy to be followed in the selection of reserve deputy sheriffs and the training to be given reserve deputy sheriffs before placing them on duty at driver's license checkpoints was discretionary, but Sheriff Moore performed a ministerial act when he selected Stacy Burns and when he placed him on duty as a reserve deputy sheriff.

Id.

Amici suggest in passing that one reason for the apparent confusion within the lower federal courts on this issue is the confusion of terminology in § 1983 municipal liability cases. Section 1983 does not itself use the term "policy." Rather, it addresses actions under color of any "statute, ordinance, regulation, custom, or usage" of a State or municipal government. *Monell,* on the other hand, speaks in terms of municipal liability for injuries inflicted pursuant to government "policy or custom" (*Monell*, 436 U.S. at 694), suggesting that "policy" is shorthand for a formalized "statute, ordinance, [or] regulation" while "custom" is a shorthand for an informal "custom and usage" which, while never formally endorsed by decision-makers, has been tacitly accepted as standard operating procedure. Later decisions of this Court seem to use the term "policy" to cover all of the terms enumerated in § 1983. *See, e.g., City of Canton v. Harris,* 489 U.S. 378 (1989). *Amici* respectfully suggest that there is no principled distinction among the various terms used; they all refer to some sort of government policy, whether or not that policy is in writing or has ever been formalized. Yet, the continued use of *Monell*'s "policy or custom" terminology has led to confusion and has led many to conclude (erroneously, we believe) that "policy" suits and "custom" suits are wholly separate causes of action entailing different elements of proof. *See* L. Kramer and A. O'Sykes, *Municipal Liability Under § 1983: A Legal and Economic Analysis,* 6 SUP. CT. REV. 249, 254-55 (1987) (Court has established vague categories of municipal liability "susceptible to many plausible definitions").

Respondent's brief well illustrates that confusion. In opposing Petitioner's argument that a single hiring decision cannot constitute a § 1983 "policy," Mrs. Brown asserts:

> Petitioner's confusion may be attributable to a failure to recognize the difference between a *Monell* "policy" and a *Monell* "custom." . . . [A]lthough a plaintiff pursuing municipal liability based on a municipal "custom" must show "persistent and widespread" practices resulting in deprivations of constitutional rights, this Court in *Pembaur* quite clearly ruled that a municipal "policy" is established by a single decision made by a municipal policymaker on a matter within his policy-making authority. 475 U.S. at 480-481. And the § 1983 plaintiff in the present case never argued that Bryan County had a "custom" of hiring persons whose criminal records demonstrated them wholly inadequate to be law enforcement officers. This is a "policy" case, not a "custom" case.

Respondent's Opposition Brief at 19-20.

Amici do not believe that the Court in *Monell* and *Pembaur* intended to create differing elements of proof for "policy" and "custom" causes of action. In both instances, the determinative issue is the role of municipal policymakers in actions leading to the plaintiff's injuries. While the Court has recognized various methods by which plaintiffs are permitted to prove that municipal policymakers played such a role, the underlying cause of action is the same in each instance. *Amici* suggest that the Court clear up the underlying confusion in this area by henceforth using only the word "policy" to cover all of the government actions enumerated in § 1983 ("statute, ordinance, regulation, custom, or usage") and making clear that there is only a single municipal liability cause of action under § 1983.

In sum, a single decision by a municipal official does not constitute "policy" for purposes of § 1983 liability

unless that decision carries out what has been understood to be an existing, albeit unofficial, standard operating procedure, or unless there is some contemplation that the decision has established a precedent that the municipality will follow if and when it again faces the same set of circumstances. In the absence of evidence that the circumstances that led to Burns's hiring had occurred previously or were likely to be duplicated, the jury verdict for Mrs. Brown cannot stand.

B. When the Decision by Municipal Officials Being Challenged Is Not Itself Unconstitutional, the Court Should be Particularly Reluctant to Impose Municipal Liability in the Absence of Evidence that the Decision Is Part of a Recurring Policy.

Amici submit that the definition of "policy" proposed in the preceding section should be adopted in all cases -- even when the decision under challenge is itself unconstitutional. Thus, if it had been Sheriff Moore himself who had pulled Mrs. Brown from her vehicle and if she had premised her municipal liability claim on his actions, those actions would not constitute Bryan County "policy" unless Mrs. Brown could make the showings outlined above.

Nonetheless, as Judge Emilio Garza argued in his dissent below, courts should be particularly cautious in finding a "policy" actionable under § 1983 when (as here) the alleged policy is not itself unconstitutional. Pet. App. 26a-29a. As Judge Garza noted, the Court in *Tuttle* insisted that "considerably more proof than a single incident will be necessary" in order to establish that the decision of a municipal official is municipal "policy" actionable under § 1983, where the decision relied on "is not itself

unconstitutional." *Tuttle*, 471 U.S. at 824 (plurality opinion).[5]

In every case in which a plaintiff whose constitutional rights have been violated seeks to impose liability on a municipality under § 1983, the key issue is whether the violation is fairly attributable to the municipality. Certainly, such attribution is reasonable where the unconstitutional conduct was taken pursuant to a municipal policy that expressly mandated such conduct. But where the municipality has not, through some policy edict, directed its employees to engage in conduct that violates the plaintiff's constitutional rights, any effort to hold the municipality liable for such conduct treads perilously close to *respondeat superior* liability -- a standard of liability rejected by *Monell*. *Monell*, 436 U.S. at 691.

Moreover, holding municipalities liable under § 1983 for conduct which policymakers did not authorize is not easily squared with the commonly understood meaning of the word "policy." As the Court recognized in *Tuttle*, "the word 'policy' generally implies a course of action con-

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[5] Indeed, the Court in *Tuttle* made clear that it was still an open question "whether a policy that itself is not unconstitutional, such as the general 'inadequate training' alleged here, can ever meet the 'policy' requirement of *Monell*." *Id.* at 824 n.7. The Court subsequently reached that question in *City of Canton*, holding that "the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *City of Canton*, 489 U.S. at 388. But the Court's opinion said nothing that undercut *Tuttle*'s continued vitality; indeed, the Court reinforced the considerably-more-proof-than-a-single-incident requirement by stating, "That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city." *Id.* at 390.

sciously chosen from among various alternatives." *Tuttle*, 471 U.S. at 823 (plurality opinion). It is thus difficult to accept the notion that an inadequate hiring process (which suggests more a failure to take action than a consciously chosen course of action) could constitute a municipal policy. *City of Canton* held that a "policy" of deliberately choosing an inadequate training program could be deemed to exist in extreme circumstances -- where the training is so inadequate as to amount to "deliberate indifference to the rights of persons with whom the police come into contact." *City of Canton*, 489 U.S. at 388. Assuming for the sake of argument that a police hiring policy could be so inadequate as to satisfy a similar "deliberate indifference" standard, only the most grossly deficient hiring policies could be so described. Thus, unless the "deliberate indifference" exception is going to be allowed to swallow the general rule that a "policy" entails a consciously chosen course of action, only hiring practices involving a significant number of hiring decisions could qualify as "deliberately indifferent" hiring policies.

Pembaur is not to the contrary. *Pembaur* involved unconstitutional conduct that had been expressly authorized at the highest levels of municipal government; under those circumstances, even a single incident of such conduct could be said to been brought about as a result of the conscious choice of municipal policymakers. But it makes no sense to assert that a sheriff's allegedly deficient judgment in a single hiring decision constitutes a conscious decision to expose citizens to constitutional violations, particularly where (as here) the evidence indicates that most job applicants were thoroughly screened.

In sum, regardless whether a § 1983 "policy" can ever be created by a single decision whose repetition is not

contemplated, there certainly can be no such "policy" where the alleged policy relied on by the plaintiff is not itself unconstitutional. Since Bryan County's decision to hire Burns cannot be deemed unconstitutional, Mrs. Brown cannot establish the requisite municipal "policy" based solely on Sheriff Moore's decision to hire Burns.

II. RESPONDENT HAS FAILED TO ESTABLISH AN "AFFIRMATIVE LINK" BETWEEN PETITIONER'S DECISION TO HIRE BURNS AND HER SUBSEQUENT INJURY

In order to recover damages from Bryan County in this § 1983 action, Mrs. Brown must demonstrate not only the existence of a municipal "policy" but also that the identified policy *caused* her injuries. *Monell*, 436 U.S. at 692 ("Congress did not intend § 1983 liability to attach where such causation was absent."). Mrs. Brown has utterly failed to establish such causation.

Proving causation in a § 1983 action entails far more than establishing that the plaintiffs' injury would not have occurred *but for* the identified municipal "policy" (in this case, the decision to hire Burns). As the Court noted in *Tuttle*, imposing a mere *but for* causation requirement would be no requirement at all, because:

> Obviously, if one retreats far enough from a constitutional violation some municipal "policy" can be identified behind almost any such harm inflicted by a municipal official; for example, [the Oklahoma City police officer] would never have killed Tuttle if Oklahoma City did not have a "policy" of establishing a police force.

Tuttle, 471 U.S. at 823 (plurality opinion). The Court rejected that approach to proving causation on the ground that "[s]uch an approach provides a means for circumventing *Monell*'s limitations altogether." *Id.*

The Court opted instead to require "an affirmative link between the policy and the particular constitutional violation alleged." *Id.* Where, as here, "the policy relied upon is not itself unconstitutional, considerably more proof than [a] single incident will be necessary in every case to establish . . . the causal connection between the 'policy' and the constitutional deprivation." *Id.* at 824. The Court required a showing not merely that the challenged policy was "likely" to lead to generalized police misconduct but that the policy was the "moving force" behind the constitutional deprivation suffered by the plaintiff and that the two were "affirmatively linked." *Id.* at 824 n.8.

The Court reaffirmed in *City of Canton* that § 1983 plaintiffs face an exacting causation requirement in municipal liability suits. The Court said, "[F]or liability to attach in this circumstance the identified deficiency must be closely related to the ultimate injury. Thus in the case at hand, respondent must still prove that the deficiency in training actually caused the police officers' indifference to her medical needs. . . . To adopt lesser standards of fault and causation would open municipalities to unprecedented liability under § 1983." *City of Canton*, 489 U.S. at 391.

In upholding the district court judgment, the Fifth Circuit applied a far more lenient causation standard than that mandated by *Tuttle* and *City of Canton*. The appeals court merely stated in general terms, "inadequate screening of a deputy could likely result in the violation of citizens' constitutional rights." Pet. App. 23a. The court added

without explanation, "[T]he jury could find that hiring an unqualified applicant and authorizing him to make forcible arrests actually caused the injuries suffered by Mrs. Brown." *Id.* at 24a. Had the proper causation standard been applied by the lower courts, Mrs. Brown never would have been permitted to present her claims to a jury.

Mrs. Brown made much, for example, of the fact that Burns had several misdemeanor convictions on his record -- including one for assault and battery. She offered no evidence, however, that this minor criminal record *caused* the constitutional violation -- *e.g.*, that a similarly situated officer without a minor criminal record would not have dragged her from her vehicle;[6] or that Burns suffered from some psychological defect (as evidenced by his misdemeanor record) that caused him to use excessive force in dealing with Mrs. Brown. Nor did Mrs. Brown offer evidence attempting to rule out other likely causes of Burns' violent behavior -- such as that he was having the same kind of "bad day" that even those without misdemeanor records can have on occasion, or that he made a mistake in judgment. *See, e.g., City of Canton*, 489 U.S. at 391 ("And plainly, adequately trained officers occasionally make mistakes; the fact that they do says little

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[6] *Amici* note that there is no indication that Deputy Morrison, Burns' partner, had a similar record of misdemeanor convictions. Mrs. Burns nonetheless contended in her suit that Morrison also acted highly inappropriately on the night in question (*e.g.*, by approaching her vehicle with his gun drawn), thereby violating her constitutional rights. Thus, the facts in this case lend little support to Mrs. Brown's contention that Bryan County's decision to hire someone with a misdemeanor criminal record was the "moving force" behind the violation of her constitutional rights.

about the training program or the legal basis for holding the city liable.").

Moreover, Mrs. Brown's claims are premised on the assumption that a municipality could develop a fool-proof hiring policy that would ensure that all those hired would never resort to unwarranted use of force. That assumption is unrealistic, as the Court recognized in *City of Canton* in connection with an inadequate training claim. The Court stated that a training program should not be adjudged deficient simply because a single police officer passed through without acquiring necessary skills. The Court said, "That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program." *City of Canton*, 489 U.S. at 390-91. Similarly, there is no basis for criticizing Bryan County's hiring policy simply because one allegedly unfit applicant slipped through the screening process. It is easy for Mrs. Brown to second-guess Sheriff Moore after-the-fact and contend that data known to him (including Burns's misdemeanor record) should have caused him to disqualify Burns. But in the absence of evidence that Bryan County's hiring policy has led to similar incidents of police misconduct, *City of Canton* counsels against a finding that Mrs. Burns has established the necessary "affirmative link" between the hiring policy and her injuries.

Tuttle absolutely insists that a plaintiff attempting to demonstrate an "affirmative link" between a challenged policy (which is not itself unconstitutional) and the alleged constitutional deprivation, must introduce "considerably more proof than the single incident." *Tuttle*, 471 U.S. at 824 (plurality opinion). Mrs. Brown has failed to meet that burden. Other than the evidence relating to her encounter

with Burns, Mrs. Brown's case rests solely on Bryan County's acceptance of the job application of someone with a misdemeanor assault and battery record, an acceptance that was fully in accord with Oklahoma law.[7] In the absence of evidence that those with a history of such convictions have, in the aggregate, appreciably inferior job performance records than those who do not, the misdemeanor evidence adds little to Mrs. Brown's case.

A. Allegedly Deficient Hiring Policies Can Never Serve as a Predicate for Municipal Liability Under § 1983.

Indeed, *amici* respectfully suggest that, given the extreme difficulty in *ever* demonstrating that a deficient hiring policy was the "moving force" behind subsequent misconduct by law enforcement officers, the Court should find as a matter of law that hiring policies can *never* serve as the basis for § 1983 liability. Hiring policies are distinguishable from training policies in this regard,

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[7] Mrs. Brown also contends, of course, that Bryan County's training of Burns amounted to deliberate indifference toward her constitutional rights. That issue is not now before the Court. If the Court reverses the Fifth Circuit's decision, Mrs. Brown presumably will have the right to raise the training issue on remand.

The inherent inconsistency between Mrs. Brown's two causes of actions merits a brief mention, however. If Bryan County's deficient training program was the "moving force" behind the violation of Mrs. Brown's constitutional rights, then the county's deficient hiring program could not have also been the "moving force" behind that violation. The high standard of causation demanded in municipal liability cases precludes both programs from being "affirmatively linked" to Burns' conduct. The district court's entry of judgment for Mrs. Brown on both causes of action was, therefore, of dubious propriety.

because the consequences of inadequate training are significantly more predictable. As the Court recognized in *City of Canton*:

> [C]ity policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force, see *Tennessee v. Garner*, 471 U.S. 1 (1985), can be said to be "so obvious," that failure to do so could be characterized as "deliberate indifference" to constitutional rights.

City of Canton, 489 U.S. at 390 n.10. The need for training is said to be "obvious" because the failure to train "will create an extremely high risk that constitutional violations will ensue." *Id.* at 396 (O'Connor, J., concurring in part and dissenting in part).

In contrast, it is virtually never "obvious" which job applicants have what it takes to become adequate law enforcement personnel and which do not. Mrs. Brown and her expert witness believe that those with misdemeanor assault and battery records should automatically be disqualified from consideration, while Bryan County and the Oklahoma state legislature disagree. Given the absence of an obviously correct answer to that question, principles of federalism counsel against the federal judiciary imposing its views on the matter upon municipal personnel officials.

Moreover, there are simply too many intervening variables to state with any degree of confidence that a deficient hiring policy was the "moving force" behind a subsequent constitutional violation. One prominent intervening variable is job training; one can expect that any successful job applicant will be required to undergo training before being assigned to law enforcement responsibilities, and that an adequate training program will weed out those who demonstrate an obvious unfitness for police work. Unless one totally discounts the possibility that people are capable of overcoming troubled pasts to become productive members of society, one cannot predict with confidence that those with minor criminal records cannot be molded (with proper training) into competent police officers. If they later engage in unconstitutional conduct during their police work, there is simply no meaningful way to determine that the misconduct was "affirmatively linked" to a deficient municipal hiring policy as opposed to deficient training, an honest mistake, or any one of numerous other potential causes.

In sum, Mrs. Brown has failed to demonstrate an "affirmative link" between Bryan County's allegedly deficient hiring policy and her injuries. Indeed, precisely because it is virtually impossible to establish an affirmative link between a deficient hiring policy and a subsequent constitutional violation, *amici* respectfully suggest that the Court declare that allegedly deficient hiring policies cannot serve as a predicate for municipal liability under § 1983.

III. PRINCIPLES OF FEDERALISM DICTATE THAT FEDERAL COURTS NOT INTERFERE WITH MUNICIPAL LAW ENFORCEMENT PRACTICES

A principle motivation behind *amici*'s participation in this case is their concern that the rapid expansion of § 1983 municipal liability causes of action in the federal courts is upsetting principles of federalism by moving decision-making from the state and local level to the federal level.

Amici believe that the Court can go a long way toward halting that expansion by making clear that § 1983 municipal liability may be invoked only under relatively narrow circumstances.

In the 18 years since *Monell* was decided, the exposure of municipal governments to tort suits has increased drastically. For example, between 1978 and 1986, the amount paid out by New York City annually to resolve tort/personal injury claims increased six-fold, to $138.9 million. *City's Nemesis: Lawyer Lipsig Makes a Killing Suing People of New York*, WALL ST. J., March 16, 1988. The city's annual tort-claims payments are now well in excess of $200 million, and the city's comptroller has warned of a "municipal liability crisis." *Id.*

Moreover, the effect of § 1983 lawsuits is not merely financial. If the Court affirms the judgment in this case, one can readily expect that municipalities around the country will alter their employment practices accordingly. Police departments will become increasingly wary of hiring anyone who has ever been convicted of a misdemeanor, in order to reduce the possibility of crippling tort suits. As the Court has readily acknowledged in other contexts, the threat of tort awards can be a highly effective means of government regulation. *See Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2620 (1992) ("State regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.").

Yet, as the Court recognized in *Rizzo v. Goode*, 423 U.S. 362, 378 (1976), "important considerations of

federalism" weigh against any federal-court challenge (including challenges in the form of § 1983 actions) to the exercise of authority by state law enforcement authorities. While *Rizzo* involved an effort to enlist the federal court's injunctive powers to control internal procedures within a municipal police department, the instant suit for damages is likely to have at least as much effect on such procedures as could any federal-court injunction.

The lower federal courts have already gone a long toward federalizing municipal law enforcement personnel practices through their increasing recognition of § 1983 municipal liability causes of action. *Amici* request that the Court begin to reverse that process. As the Court recognized in *City of Canton*, a too-broad interpretation of § 1983 municipal liability:

> [E]ngages the federal courts in an endless exercise of second-guessing municipal employee-training programs. This is an exercise we believe the federal courts are ill-suited to undertake, as well as one that would implicate serious questions of federalism.

City of Canton, 489 U.S. at 392. Those words are equally valid in the context of municipal hiring programs.

CONCLUSION

Amici curiae Washington Legal Foundation and the Allied Educational Foundation respectfully request that the Court reverse the decision of the U.S. Court of Appeals for the Fifth Circuit.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
WASHINGTON LEGAL
FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Counsel for *amici curiae*

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